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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 65

UNITED STATES OF AMERICA,
Petitioner,

VERSUS

LOUIS T. MERZ, ET AL.,
Respondents.

BRIEF FOR THE RESPONDENTS ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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October, 1963.

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Federal Rules of Civil Procedure Involved i

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OPINIONS BELOW

The District Court prepared no opinion. The opinion of the Court of Appeals (R. 471-478) is reported at 306 F.2d 39.

JURISDICTION

The jurisdictional requisites are adequately stated in the brief of petitioner under 28 U.S.C. 1254(1).

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Rules 53(e)(2) and 71A(h) are set out in the Appendix hereto.

QUESTIONS PRESENTED

1. Whether objections as to the absence of particular findings in a commission's report on just compensation may be raised in this Court, when such objections were not included in the written objections to the report in the District Court required by Rule 53(e)(2) of the Federal Rules of Civil Procedure, and no issue as to the amounts of the awards was presented to the Court of Appeals or in the petition for certiorari?

2. If such objections may now be urged in this Court, whether, on this record involving lands viewed by the Commission, there was sufficient detail in the findings and reports which stated the farm tracts involved, the clearance easements taken, the highest and best use of the land (specifically rejecting claimed special uses), and the proper measure of just compensation (the difference in fair cash market value immediately before and after the taking), specifically excluding any consideration of use of space within the clearance easements by aircraft or otherwise?

STATEMENT

This is a condemnation action to take clearance easements over several farms and one tract in fee in Washita County, Oklahoma. The clearance easements were taken to provide additional facilities for Clinton-Sherman Air Force Base and for other military purposes of the Air Force (R. 2). The complaint was filed in March, 1956 (R. 2).

The clearance easements taken varied from 13 to 164 feet in elevation (R. 46-47). They granted the Government the perpetual right to top, cut to ground level, remove and prohibit trees, bushes, shrubs, or any other growth or

undergrowth from extending above described planes. They granted the continuing perpetual right to remove, raze, destroy and prohibit any construction of buildings, other structures and embankments within the easements and granted the right of ingress and egress to exercise such rights (R. 3). Due to stipulation as to some awards and judgments being unappealed as to others, this case now involves eight clearance easements.

By reason of the character, quantity and location of the property condemned, and for other reasons, the District Court ordered the issue of just compensation to be heard by a Commission (R. 36-37). The Government objected to this method of trial in the District Court, but the objection was abandoned prior to appeal to the Tenth Circuit. The District Court's judgment adopted the findings and reports of the Commission (R. 54). On the appeal from that judgment, the Government raised only two questions—the sufficiency of detail in the reports and the admissibility of the testimony of one witness, Mr. Willcox. The single issue presented by the Government now is the adequacy of details in the reports. Neither on the appeal below nor in the petition for certiorari was any question raised as to the sufficiency of the evidence to support the awards.

The Commission filed both an original "Report of Commission" and an "Additional Report of Commission," giving the Government two opportunities to file written objections pursuant to Rule 53(e)(2) of the Federal Rules of Civil Procedure (R. 37-44, 45-49). The findings and reports described separately the tracts involved and stated the clearance easements taken as to each tract, varying from 13 to 164 feet in elevation (R. 37-44). They found the owner-

ship of the tracts and the nature of the interests owned by the parties, and further that the highest and best use of the land was for general argicultural purposes (R. 47).

The reports stated the measure of compensation awarded each land owner—". . . the difference between the fair cash market value of the estate of the defendants at the time of the taking and the fair cash market value of the estate of the defendants immediately after said taking being the demunition (*sic*) of said fair cash market value caused solely and directly by the taking . . ." (R. 48). The reports rejected any consideration of use of the area included in the clearance easements, such as by airplanes or otherwise (R. 48). It was found that the proof was speculative and inadequate to show any value of Tract A-142 as a sand pit (R. 43-44). The reports stated that the motion to strike the evidence of Mr. Davis as to sales of sand from Tract A-142 was granted, and that the motion to strike all the testimony of Mr. Willcox was denied (R. 48). And it was reported that the Commission personally viewed the lands in question (R. 38).

The Government made no request for specific findings and the order appointing the Commission required no speical findings of fact and conclusions of law (R. 36-37). After trial and filing of the findings and reports by the Commission, the Government served written objections. Among other objections to the original report, the general objection was made that no findings of fact or conclusions of law were set forth as required by Rule 53 (R. 44). Upon the filing of the additional report, which incorporated the original report in full (R. 46), the Government made its written

objections to *both* the original report and the additional report (R. 49-52). Eight objections were stated, Objections 2 through 6 relating to the form of the reports (R. 50).

These written objections served pursuant to Rule 53(e)(2) made the general objection that "The Reports wholly fail to make specific findings as to the facts . . ." (Objection 2, R. 50). Further objections complained only in general terms that the reports failed to show the exclusion of incompetent evidence and how controverted testimony was resolved; that the reports amounted only to a general verdict, precluding review; and that ownership of one tract was not found (R. 50).[1] Due to their importance in connection with the requirement of written objections under Rule 53(e)(2), these objections by the Government in the District Court are discussed and reproduced in full hereafter (pp. 9-10, *infra*). The objections served did not include objections now made to the findings, calling for at least five specified additional findings discussed in the Government's brief (Brief for the United States, pp. 10-13).

The District Court overruled the written objections and adopted the reports by its judgment (R. 54-69). The general objection as to the form of the reports was also rejected by the Court of Appeals. It sustained the reports as showing the proper method of determining just compensation, and stated that the awards "were well within the range of this conflicting testimony" 306 F.2d at 42. The

[1] This question was resolved by a procedure suggested by the Court (R. 53), and the finding was made in the judgment (R. 64-65, 69-70). No complaint on this point is now made by the Government. The objection does demonstrate how such contentions as to form may properly be taken care of in the trial procedure, upon timely specified objections.

opinion below observed that the evidence presented was properly directed solely to the diminution in value of the lands after the taking, and that there were not numerous elements to consider as to just compensation. The Tenth Circuit concluded:

> "We are satisfied that, considering the record as a whole, including all the evidence, our power to review the awards can be properly exercised, and that more specific findings would not be helpful. The situation might be different if there were numerous elements to be considered in arriving at just compensation, as there were in the cases from the Fourth and Fifth Circuits which the United States relies upon. The issues in this case are not complicated, however, and the findings are entirely adequate to permit us to review them and conclude that they are not clearly erroneous." 306 F.2d at 42-43.

ARGUMENT

Introductory

Rule 53(e)(2) of the Federal Rules of Civil Procedure requires that written objections to reports be served. In this case, the Government had two opportunities to specify any additional findings that it wished. The written objections to the original report, and the subsequent written objections directed to both the original and additional report, contained no specification of the five special findings now mainly argued by the Government. The only timely objections which might be relied upon by the Government spoke in mere general terms of the insufficiency of the findings of fact and conclusions of law. The sound requirement for such objections as to form to be timely made precludes

insistence upon such details at this juncture. Moreover, neither in the Court of Appeals nor in the petition for certiorari were the awards to these land owners questioned on the ground that the evidence was insufficient to support them. Under these circumstances, the belated specification of details should not be heard as grounds for prolonging the litigation.

The original "Report of Commission" and the "Additional Report of Commission" stated sufficiently the findings and conclusions supporting the awards. They demonstrate that the awards—well within the range of conflicting testimony—were soundly based on the fair cash market value of the property immediately before and after the taking. Improper elements of compensation were expressly excluded from consideration. In practical terms, the reports are sufficient on this record for fair judicial review, as both the District Court and Court of Appeals found. The objections as to form do not justify reversal and prolongation of the controversies.

I.

The Government's objections to the reports may not be urged now, not having been included within the written objections required by Rule 53(e)(2), and the amounts of the awards being unchallenged.

Rule 71A(h) of the Federal Rules of Civil Procedure provides in pertinent part as follows:

> ". . . If a commission is appointed it shall have the powers of a master provided in subdivision (c) of Rule 53 and proceedings before it shall be governed by the provisions of paragraphs (1) and (2) of subdivision (d) of Rule 53. *Its action and report shall be determined by a majority and its findings and report shall*

have the effect, and be dealt with by the court in accordance with the practice, prescribed in paragraph (2) of subdivision (e) of Rule 53. Trial of all issues shall otherwise be by the court." (Emphasis added.)

Rule 53(e)(2) of the same rules, made applicable by Rule 71A(h) to such commission procedure, provides:

"(2) *In Non-Jury Actions.* In an action to be tried without a jury the court shall accept the masters' findings of fact unless clearly erroneous. *Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties.* Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions." (Emphasis added.)

The requirement of written objections to the report, if any be asserted, is plainly mandatory. To prevent piecemeal and protracted proceedings before masters and commissions, such objections are required to be timely served. They are required when they may be useful to correct errors in form, and may not be urged as untimely grounds for remand for additional findings—or for a new trial after seven years of litigation as requested by the Government in this case.[2]

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[2] Brief for The United States, p. 30. The inequity of this position is underscored by the fact that the Government did not question the sufficiency of the evidence to sustain the awards in the Court of Appeals or in the petition for certiorari. Moreover, these cases of individual land owners have been in court for over seven years on relatively small controversies as to deficiencies in the deposits for the takings (R. 66-67).

The written objections to the reports made no request for the findings now specified by the Government. After filing of the original "Report of Commission," written objections were served by the Government (R. 44-45). They are moot because of filing of the "Additional Report of Commission" and the superseding written objections by the Government to *both* reports (R. 49-52). Nevertheless, it should be noted that these written objections to the original report required none of the findings now detailed by the Government (R. 44-45). On this score, the Government can point only to the general terms of Objection 2 ". . . that no findings of fact or conclusions of law are set forth therein as required by Rule 53, F.R.C.P." (R. 44). None of the objections raised the five "factual questions" now stressed by the Government (Brief for The United States, pp. 10-11).

With the filing of the subsequent "Additional Report of Commission" (R. 45-49), the Government had its second opportunity for objections. It served written objections under Rule 53(e)(2), addressed to *both* the original and additional report (R. 49-52). All of the objections having relevance to the Government contentions on insufficiency of detail in the reports are reproduced in the note below.[3]

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[3] The relevant portions of the written objections directed to both the original and additional reports, are as follows:

"Objections to Report of Commission and Additional Report of Commission—Filed October 14, 1960.

"Comes now the plaintiff the United States of America and objects to the Report of the Commission dated October 23, 1959, filed herein on November 9, 1959, and to the Additional Report of Commission dated September 26, 1960, and filed October 7,

The only objections the Government might rely upon as including the five findings now specified would be the Mother-Hubbards, Objections 2 and 5. Objection 2 complained only in general terms of failure to make specific findings as to the facts and failure to show how applicable principles of law were applied. Objection 5 alleged that the reports amounted only to a general verdict. Nowhere did the objections appear which the Government argues now.

Now the Government states its objections to the reports in terms of five "illustrative factual questions" that are posed. It is urged that the reports should have found specially the market value of the land before the taking;

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[3] (Continued)

1960, in Tracts Nos. A-104E, A-106E, A-107E, A-118E, A-119E, A-122E, A-123E, A-124E, and A-142E for the following reasons:

* * * * * *

"2. The Reports wholly fail to make specific findings as to the facts on which the Commission based its valuation, and fail to show hay (sic) they applied applicable principles of law to the facts in reaching their ultimate conclusions.

"3. The Reports wholly fail to show that all incompetent and inadmissible testimony was disregarded.

"4. The Reports wholly fail to show how controverted testimony was resolved, if it were, in arriving at the valuations, and are therefore deficient and inadequate.

"5. The Reports taken as a whole amount to no more than a general verdict of a jury, since no specific findings of any controverted issues were made, the only specific findings being as to those matters which were stipulated to by the parties to this action. Therefore the Reports are wholly inadequate to furnish an adequate basis for review by the Trial Judge or an Appellate Court.

"6. The Reports are inadequate in that they fail to make a finding as to the ownership of the portion of Tract No. A-123E herein being litigated." (R. 49-50).

the proportional depreciation in value attributable to the easements; the value of the mineral estates; the injury to the mineral estates caused by the easements; and the practical effect of the easements on agricultural use of the land (Brief for The United States, pp. 10-13). The Government argues that "at least" these questions should have been resolved.

The Court of Appeals in the instant case properly held that on this record sufficient determinations were made, as did the Ninth Circuit under similar circumstances in *United States* v. *Lewis*, 308 F.2d 453 (9th Cir. 1962). But in any event, the Government should not be heard now on new objections—objections that should have been served within ten days after the reports and not three years later on a third court review. As the Ninth Circuit properly held, such review of the form of reports should be confined ". . . to ascertain what specific matters are asserted, by objections of the United States, not to have been dealt with adequately." *Id.* at 456.

Rule 53(e)(2) has made clear the requirement of timely written objections to such reports. The equity requirement and its function are stated plainly in *Sheffield & Birmingham Coal, Iron & R. Co.* v. *Gordon*, 151 U.S. 285, 290-291 (1894):

> "Proper practice in equity requires that exceptions to the report of a master should point out specifically the errors upon which the party relies, not only that the opposite party may be apprised of what he has to meet, but that the master may know in what particular his report is objectionable, and may have an opportunity of correcting his errors or reconsidering his opinions.
>
> * * * * * * *

> "So in *Greene* v. *Bishop*, 1 Cliff. 186, 191, *Mr. Justice Clifford* held that 'general allegations of error, without pointing to any particulars, are clearly insufficient, for the reason that, if allowable, the losing party might always compel the court to hear the cause anew, and should that practice prevail, references such as are made in this case would become both useless and burdensome, as they would only operate to promote delay and increase the expenses of litigation, without relieving the court from any of the labor of the trial or ever accomplishing anything of value to either party.' See also *Stanton* v. *Alabama & C.R. Co.* 2 Woods, 506, 518."

Where such particular objections to a report are not timely made in the trial court, they will not be considered as grounds for reversal of the judgment. *United States* v. *Northern Pacific Ry.*, 311 U.S. 317, 372 (1940); *Sheffield & Birmingham Coal, Iron & Ry. Co.* v. *Gordon*, *supra*; *Coghlan* v. *South Carolina R. R.*, 142 U.S. 101, 114-115 (1891); *Simpson* v. *Baker*, 2 Black (67 U.S.) 581 (1862); *Savage* v. *Monarch Royalty Corp.*, 64 F.2d 650 (10th Cir. 1933); *Cf. Kennedy* v. *United States*, 115 F.2d 624, 625 (9th Cir. 1940). Allegations of error in such reports are considered only when pointed out by specific objections, and not by mere "general objections," as *Simpson* v. *Baker*, *supra*, and *Savage* v. *Monarch Royalty Corp.*, *supra*, forcefully demonstrate. Moreover, the requirement of timely objections should apply with special force where the complaints deal with the form of the reports only.

In *United States* v. *Lewis*, 308 F.2d 453 (9th Cir. 1962), such attempted reservation of the Government's contentions by a mere general objection was rejected. The Court care-

fully limited its review as to the sufficiency of details in the reports to the specific objections served by the Government. Where the written objections disclosed specific deficiencies, such as the absence of a finding on the highest and best use, the opinion reversed the *Gill* and *Lewis* cases. 308 F.2d at 458-459. The *Bennington* and *Morrison* cases were remanded for reconsideration of the transcript on the predicate of "specific objections to specific findings" 308 F.2d at 461. The Court refused to consider abstract complaints about the findings or to remand for conformity to some unarticulated standard of detail in reports, stating:

> *"This course we reject. If there be inadequacies in a particular report, they must be specified by objection to the report.* If any case is to be remanded for correction of error in this area, it must be with instructions that by report or finding resolution of some specific dispute be made or some specific inadequacy be remedied. Otherwise, as we view the matter, there could be no end to these litigations.
>
> *"We shall then in each case examine the record and briefs to ascertain what specific matters are asserted, by objections of the United States, not to have been dealt with adequately."* 308 F.2d at 456. (Emphasis added.)

Rule 53(e)(2) and sound equity practice do not permit such belated objections to the reports. Since they were not asserted by timely written objections, this Court should not now entertain the Government's objections as to form. As for the substance of the controversy, all contentions as to sufficiency of the evidence to support the awards have long since been discarded. Under these circumstances, the judgments in seven years of litigation should not be erased.

II.

The reports adequately stated the basis of the awards and are sufficient for proper judicial review.

The Court of Appeals recognized that the findings must be "sufficiently comprehensive and pertinent to the issues" to provide the basis for the awards. 306 F.2d at 42. After review of this record, both the District Court and the Court of Appeals were satisfied that on these particular facts, the findings were sufficiently specific to serve as the basis for the awards, with proper judicial review. Their conclusion was sound.

Although it was not aided by Government requests for specific findings and conclusions, or by written objections disclosing particular findings desired by the Government, the Commission made the essential determinations. It described the tracts involved, which the Commission viewed (R. 38-43); the clearance easements taken (R. 46); the interests owned by the parties; and it found the highest and best use of the land to be for general agricultural purposes (R. 47). Improper elements were specifically excluded from the Commission's consideration, such as use of the area within the easements by aircraft or otherwise (R. 48). The reports determined that there could be no value attached to certain land because of the presence of sand or other building materials on the property (R. 43-44), and all the proof relating thereto was stricken by the reports (R. 48). The damages found were confined to diminution of fair cash market value immediately before and after the taking (R. 48). The basis of the awards was made clear.

The Court of Appeals properly judged these findings to be adequate. It concluded:

"'The primary and basic test as to the adequacy of findings is whether they are sufficiently comprehensive and pertinent to the issues in the case so as to provide a basis for purposes of decision.' Shapiro v. Rubens, 7 Cir., 166 F. 2d 659, 665. See United States v. Tampa Bay Garden Apartments, Inc., 5 Cir., 294 F. 2d 598; United States v. Pendergrast, 4 Cir., 241 F.2d 687; 5 Moore's Fed. Practice Par. 52.06 [1], at 2656 (2d Ed. 1951). The extent of exactness which is required in findings depends upon the nature of the matter involved. Kelley v. Everglades Drainage Dist., 319 U.S. 415, 63 S. Ct. 1141, 87 L.Ed. 1485. The evidence presented to the commission in this case related entirely to the diminution in value of the lands after the easements were taken, and a general finding as to this amount was made." 306 F.2d at 42.

The Government maintains that "at least" some five additional subsidiary facts should be found and many questions of law resolved (Brief for The United States, pp. 10-13). We submit that the Commission's determinations were made clear. More words might argue better for its judgment on the awards, but their basis is adequately stated. We reach the point whether, as the Government contends, masters and commissions are to be policed under a requirement to "show both what the evidence was and how the commission used it in reaching its conclusions" (Brief for The United States, p. 22). This position is both unsound and unsupported. The direct answer to the Government's contention was stated by JUDGE LEARNED HAND:

"*. . . Findings should not be discursive; they should not state the evidence or any of the reasoning upon the evidence;* they should be categorical and confined to those propositions of fact which fit upon the relevant

propositions of law . . ." *Petterson Lighterage & Towing Corporation* v. *New York Central R. Co.*, 126 F.2d 992, 996 (2d Cir. 1942). (Emphasis added.)

Masters and commissions should not be called upon for a discourse on what the evidence was and how it was used. Such a procedure would be a needless burden, stultifying the proper function of these court officers. This notion has been rejected for court findings, as well as those of masters and commissions. Findings are not obliged to include "a detailed itemization of the proof relied upon in order to reach that result." *United States* v. *Lewis*, 308 F.2d 453, 460 (9th Cir. 1962); *Loew's* v. *Lieberman*, 78 F. Supp. 201, 216 (D. Mass. 1948). They need not contain "detailed evidentiary findings . . ." *Carr* v. *Yokohama Specie Bank, Limited*, 200 F.2d 251, 255 (9th Cir. 1952), nor must they extend to "specific findings on every subsidiary evidentiary issue . . ." *Elam* v. *United States*, 250 F.2d 582, 583 (6th Cir. 1958), as the Government seems to insist. Findings need not be made "on all the facts presented," *Klimkiewicz* v. *Westminster Deposit & Trust Co.*, 122 F.2d 957, 958 (D.C. Cir. 1941), *cert. den.*, 315 U.S. 805 (1942), and they are not inadequate because they do not discuss every contention of the parties. *Schilling* v. *Schwitzer-Cummins Co.*, 142 F.2d 82, 84 (D.C. Cir. 1944).

As the opinions indicate, neither court findings nor those of masters and commissions have been held to the requirements for minutiae which the Government suggests. Especially if applied to masters and commissions, such demands for the detailing of evidence and its analysis would impede procedures designed for the weighing of voluminous proof. The use of commissions under Rule 71A(h), permit-

ting the hearing of a volume of claims and viewing of numerous properties, would be unreasonably burdened by insistence upon such discursive findings. Instead, commission findings should be required only in reasonable detail, showing the basis of awards made. As the Tenth Circuit properly held, this is now the rule. And it is soundly fashioned for the use, in necessary cases, of commissioners with varied skills and the viewing of properties, to which great weight is attached. See *e.g.*, *United States* v. *Wise*, 131 F.2d 851, 853 (4th Cir. 1942); *United States v. Certain Lands located in Orange County*, 57 F. Supp. 96, 98 (S.D. N.Y. 1934); *United States* v. *80.46 Acres in Erie County*, 59 F. Supp. 876, 877 (W.D. N.Y. 1944), *aff'd*, 148 F.2d 714 (2d Cir. 1945).

We will respond briefly to the details of the Government contentions on the need for additional findings. The arguments focus primarily on the five additional "illustrative factual questions" now specified,[4] commencing with stress upon market value before the taking. Of course, the proof taken properly included considerable testimony on values before and after the taking from several witnesses, and the Commission viewed the lands (R. 38). From the expert testimony as summarized by the Government brief, it is apparent that with all the elements considered, there was a range on values before and after the taking from $16,950.00 to $117,927.00 as the amount of damages, and

[4] The questions suggested relate to (1) the market value of the land before the taking; (2) the proportional depreciation in value attributable to the easements; (3) the value of the mineral estates; (4) the injury to the mineral estates; and (5) the practical effect of the easements on the agricultural use of the land (Brief for The United States, pp. 10-13).

the total of all the awards amounted only to $49,982 (Brief for The United States, Appendix III, pp. 45-46).[5] Obviously, the values before and after the taking were considered and not ignored in making the awards. There was substantial evidence on mineral values and the damage to them (R. 120, 127-132, 164, 239-241)[6] as well as on damage to agricultural use of the land (R. 130, 137, 184-186).

Since the awards were soundly based on the evidence and well within its limits, checking the work papers of the Commission would not seem necessary. Similarly, a double check on the Commission by asking for calculations on the basis of the proportional depreciation in value to each tract—which is irrelevant—would impose an unjustified burden. The courts have properly rejected such belated efforts by a party to have additional facts found to strengthen its position on appeal. *Cf. Kennedy* v. *United States*, 115 F.2d 624, 625 (9th Cir. 1940). In any event, with the sufficiency of the evidence to support the awards apparent and unquestioned, the request for such laborious calculations seems out of place.

The decisions relied upon by the United States do not support the contention that the Commission's report must

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[5] The amount of $117,927.00 was the proof of damages from Mr. Willcox. The criticism of his testimony is unfounded, and the record shows he clearly stated his opinions on the basis of fair cash market values immediately before and after the taking for each tract (R. 125, 128, 129, 130, 132, 186-187), considering the height of the specific easements taken and valuing the minerals separately.

[6] As the Court of Appeals pointed out, note 2, 306 F.2d at 41, Mr. Willcox valued the minerals separately and found total damage to them suffered when the clearance easements were lower than the height of an average drilling rig (R. 127-133).

detail such subsidiary evidentiary findings. Cases involving review of decisions by administrative tribunals have little, if any, relevance to a determination of the specificity required of commissioner's reports. Section 8(b) of Administrative Procedure Act[7] requires detailed findings by administrative agencies. Furthermore, the cases cited by the Government deal only with the correctness of the rule of law applied by a particular administrative agency, *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156 (1962); *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61 (1953); or with the question of whether the court could ascertain whether or not the agency had applied the correct principles of law in making its determination. *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80 (1943); *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475 (1942); *Florida* v. *United States*, 282 U.S. 194 (1931); *United States* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 294 U.S. 499 (1935). In the present case it is clear that the commissioners applied the correct rule of law, i.e., the difference in the fair market value before and after the taking.

Cases holding that district courts must comply with Rule 52(a) in making their determinations are undoubtedly correct, but have little bearing on whether the reports herein involved are adequate. See *Commissioner* v. *Duberstein*, 363 U.S. 278, 284-285 (1960), where the Court refused to lay down a uniform rule as sought by the Govern-

[7] Section 8(b) of the Administrative Procedure Act provides that agency decisions shall include a "statement of findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law or discretion presented in the record." 5 U.S.C. § 1007(b).

ment; *Hatalhey* v. *United States*, 351 U.S. 173 (1956); *Mayo* v. *Lakeland Highlands Canning Co.*, 309 U.S. 310 (1940); *Public Service Commission of Wisconsin* v. *Wisconsin Telephone Co.*, 289 U.S. 67 (1933), where the lower court made no findings at all. Rather, as the Government realizes, in cases involving commissioners' reports, the courts of appeals have recognized that the facts of each case must determine the requisite specificity of findings and have refused to announce a uniform rule such as requested by the Government.[8] Indeed the Government's suggestion that reviewing courts should look only to the reports (Brief for The United States, p. 22) in effect precludes the type of judicial review that every court of appeals has announced it will undertake, namely to review, as required by Rule 53(e)(2), the findings and the evidence to see if the findings are clearly erroneous. The parties are entitled to such a review by the appellate court and not one restricted to a mere summary of the evidence.

We come to the two opinions being reviewed by this Court, No. 79, *2872.88 Acres of Land, etc., et al.* v. *United States*, 310 F.2d 775, from the Fifth Circuit, and the instant case from the Tenth Circuit. We are not familiar with de-

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[8] Thus, see the different *results* recorded in the following cases under varying facts. *United States* v. *Cunningham*, 246 F.2d 330 (4th Cir. 1957); *United States* v. *Carroll*, 304 F.2d 300 (4th Cir. 1962); *United States* v. *Pendergrast*, 241 F.2d 687 (4th Cir. 1957); *United States* v. *2,477.79 Acres of Land in Bell County*, 259 F.2d 23 (5th Cir. 1958); *United States* v. *Bubler*, 254 F.2d 876 (5th Cir. 1958); *United States* v. *44.00 Acres in the Town of Greece*, 234 F.2d 410 (2d Cir. 1956), *cert. denied*, 352 U.S. 916 (1956); *United States* v. *Certain Parcels of Land in Philadelphia*, 215 F.2d 140 (3d Cir. 1954); *United States* v. *Lewis*, 308 F.2d 453 (9th Cir. 1962); *United States* v. *Waymire*, 202 F.2d 550 (10th Cir. 1953).

tails of the record in the former case, but the opinion does require the reports to state which evidence was credited and which was discredited and to identify that relied upon. In this, it seems contrary to the sound reasoning of JUDGE LEARNED HAND in *Petterson Lighterage & Towing Corp.* v. *New York Central R.R.*, 126 F.2d 992, 996 (2d Cir. 1942), and the cases discussed in connection with it, *supra*, pp. 15-16. See also *Ramos* v. *Matson Navigation Co.*, 316 F.2d 128, 130, 132 (9th Cir. 1963). It goes beyond the practical requirement, depending on the nature of the case, that findings be "sufficient to indicate the factual basis for the ultimate conclusion." *Kelley* v. *Everglades Drainage District*, 319 U.S. 415, 421 (1943).

The opinion of the Tenth Circuit in the instant case is in accord with decisions of this Court, and with the general requirement soundly applied as to such findings. On this record it was correct in concluding:

> ". . . The evidence presented to the commission in this case related entirely to the diminution in value of the lands after the easements were taken, and a general finding as to this amount was made.
>
> "We are satisfied that, considering the record as a whole, including all the evidence, our power to review the awards can be properly exercised, and that more specific findings would not be helpful . . ." 306 F.2d at 42.

CONCLUSION

We submit that the Government's objections are untimely and unsound. The work of this Commission was done properly—in substance and in form. It should not be undone now.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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October, 1963.

APPENDIX

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Rule 53(e)(2) provides:

> "(2) *In Non-Jury Actions.* In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions."

Rule 71A(h) provides as follows:

> "(h) TRIAL. If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue; but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix, unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed

[APPENDIX]

by it. If a commission is appointed it shall have the powers of a master provided in subdivision (c) of Rule 53 and proceedings before it shall be governed by the provisions of paragraphs (1) and (2) of subdivision (d) of Rule 53. Its action and report shall be determined by a majority and its findings and report shall have the effect, and be dealt with by the court in accordance with the practice prescribed in paragraph (2) of subdivision (e) of Rule 53. Trial of all issues shall otherwise be by the court."